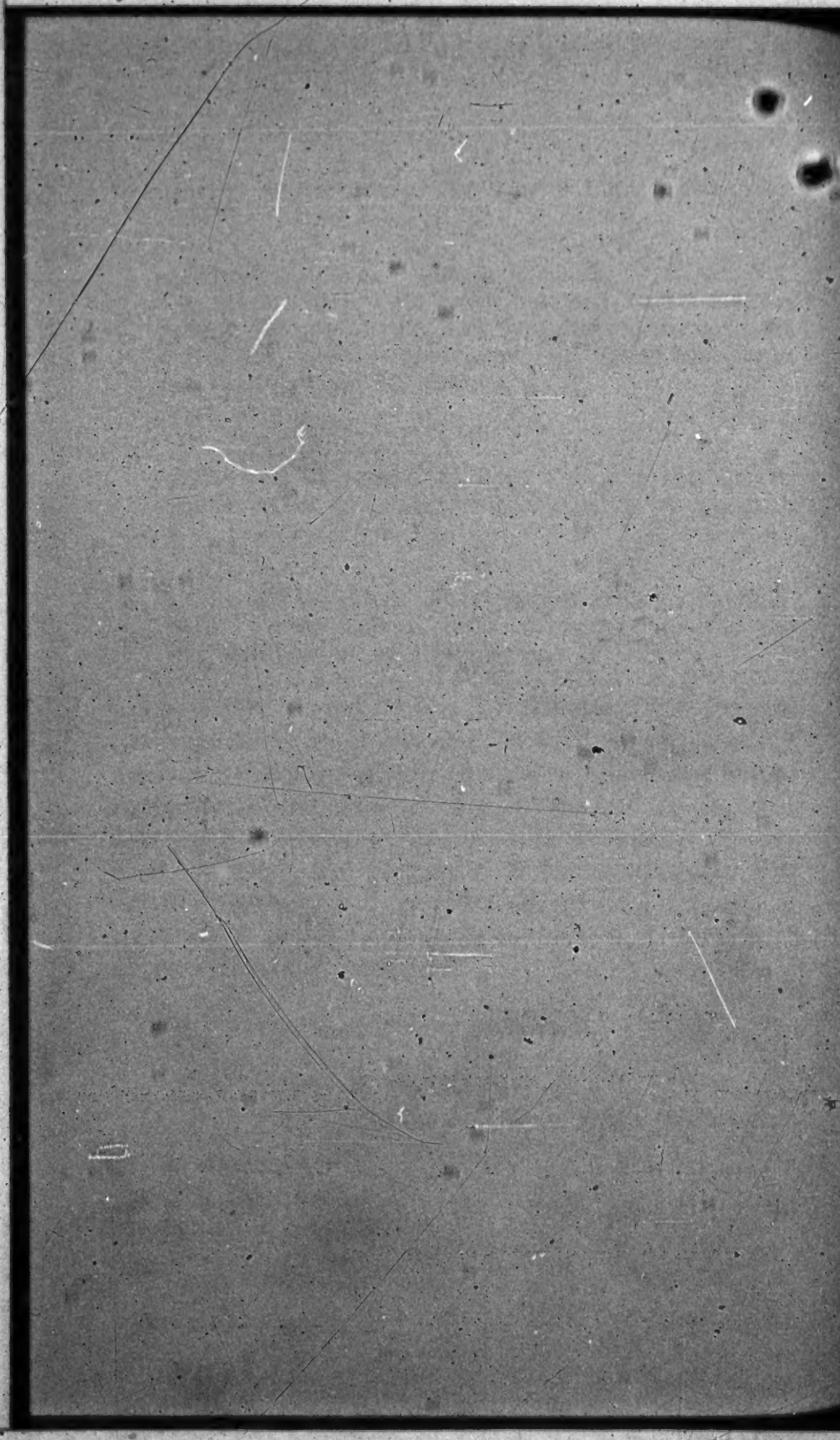

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1930.

No. 19 Original.

STATE OF ARIZONA, *Complainant*,

v.

STATE OF CALIFORNIA, STATE OF NEVADA, STATE OF UTAH, STATE OF NEW MEXICO, STATE OF COLORADO, STATE OF WYOMING, AND RAY LYMAN WILBUR, SECRETARY OF THE INTERIOR, *Defendants*.

MOTION BY THE DEFENDANT STATES TO DISMISS THE BILL OF COMPLAINT, AND BRIEF OF STATES OF UTAH AND WYOMING.

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Attorney General of Utah.
JAMES A. GREENWOOD,
Attorney General of Wyoming.

WILLIAM W. RAY,
Of Counsel for Utah.
WILLIAM O. WILSON,
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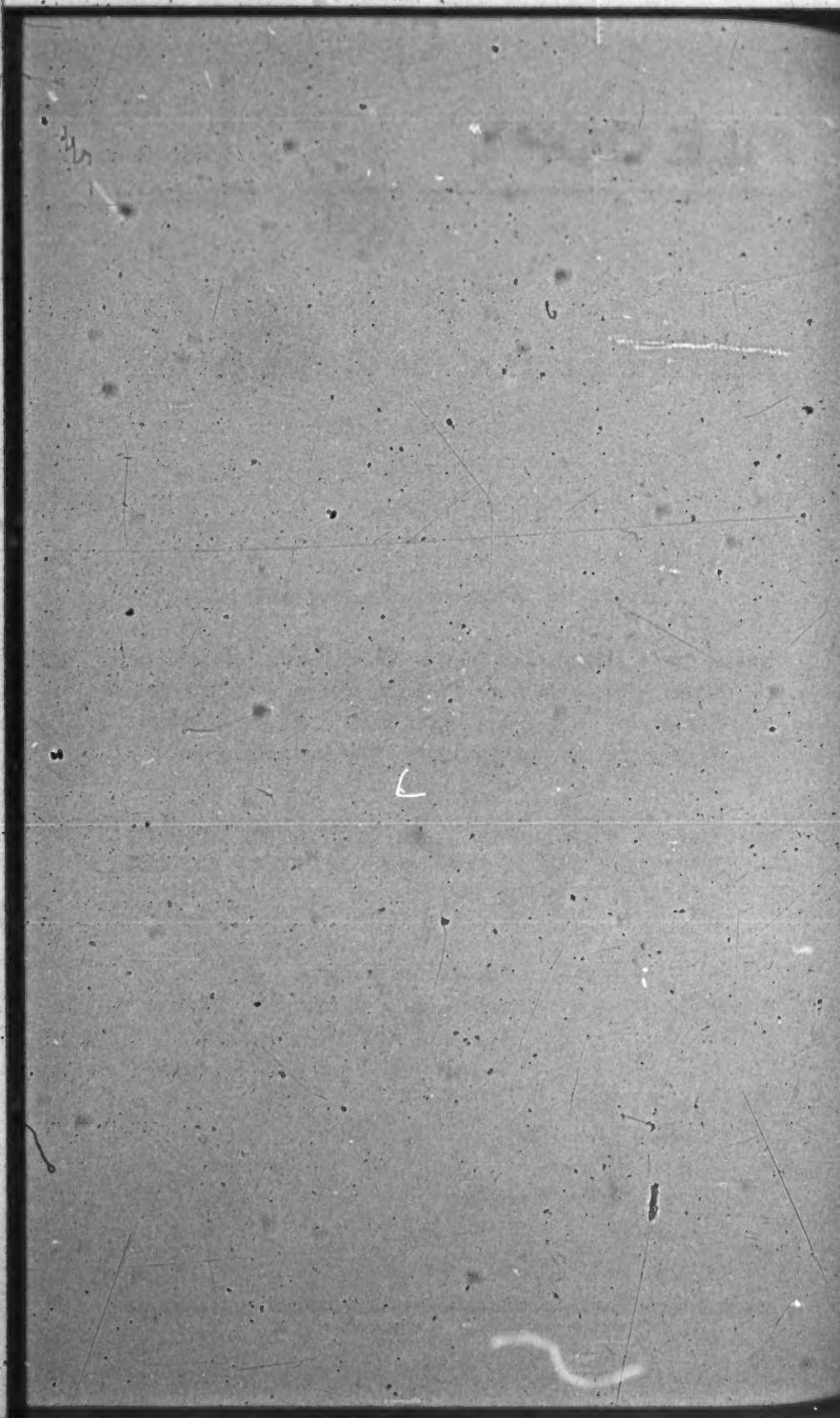

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MOTION BY THE DEFENDANT STATES TO DISMISS THE BILL OF COMPLAINT.

Now come the States of California, Nevada, Utah, New Mexico, Colorado and Wyoming, by the Attorney General of each State, and move, jointly and severally, that the bill of complaint be dismissed, for the reasons:

I.

This Honorable Court is without jurisdiction of the subject matter of the bill of complaint, for the reason that the same does not present for adjudication any case or controversy of which the Court can take judicial cognizance.

II.

The bill of complaint does not join the United States, which is an indispensable party to this suit.

III.

The bill of complaint does not state facts sufficient to constitute a cause of action against the said defendants or either or any of them.

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BRIEF OF STATES OF UTAH AND WYOMING IN SUPPORT OF MOTION.

Statement.

The plaintiff's bill of complaint in this action is brought to have declared unconstitutional the Colorado River Compact, attached to the bill of complaint, page 50, and the Boulder Canyon Project Act attached to the complaint, page 58.

The Colorado River Compact is an agreement, made in accordance with the provision of the Federal Constitution, between the States of Colorado, Nevada, Utah, Wyoming, California and New Mexico. In addition to said States, Arizona by legislative act, had resolved to enter into a compact. Its representative was a member of and took part in the conference which formulated the compact and signed the same on behalf of Arizona. However, that State never ratified it. The compact as formulated and signed by the States was approved and ratified by the Congress of the United States in the passage of the Boulder Canyon Project Act. The compact itself deals exclusively with a division between the compacting States of the waters of the Colorado River and its tributaries. Article 1 of the compact sets forth the purposes of the agreement, Article 2 the definitions of the terms used in the Act, Article 3 is an allocation of waters between the compacting States and a regulation of the conditions of its use. Article 4 is a stipulation between the parties to the effect that with the approval of the Federal government the Colorado River shall be deemed a non-navigable stream in so far as the right to devote the waters of the river to the purposes of the compact is concerned. Article

5 sets up a commission to study and report upon the flow of the river. Article 6 provides a method for the settlement of controversies between the parties to the compact as to the subject-matter covered by the compact. Article 7 preserves to the United States its right to discharge its obligations to Indian Tribes in respect to the waters of the river. Article 8 protects all vested rights to the use of the waters of the river. Article 9 permits the States to resort to the courts to enforce their rights as fixed under the compact. Article 10 fixes terms under which the compact may be terminated, and Article 11 provides the method of approval of the compact.

Upon the execution of the compact by the six States, the Congress of the United States approved and ratified the same by the passage of the Boulder Canyon Project Act, and further provided for impounding of the waters of the river and the devoting of the waters so impounded to the purposes of the compact. Arizona is not a party to the compact and the compacting States do not contend that the compact undertakes or pretends to or could make any disposition of or affect the rights of the State of Arizona to the waters of the Colorado River or restrain that State in its appropriation and use of such waters as fully as said State would be entitled to appropriate and use such water in the absence of the compact.

The Boulder Canyon Project Act is not the creation of all or any of the compacting States, but is an act of the Federal government. Under the provisions and mandate of this act the Secretary of the Interior, a Federal officer, is alleged to be proceeding to enter the State of Arizona and there build a dam across the

channel of the Colorado River, which dam when constructed will impound within the limits of the States of Arizona and Nevada substantially thirty million acre-feet of water. The act provides for the construction of said dam, the impounding of said waters, the generating of power in connection with said dam, and the distribution of the water so impounded.

It is not charged in the bill that any of the States have entered or are threatening to enter the State of Arizona, that they or any of them are constructing or threatening to place any structures in the State of Arizona, or that either Utah or Wyoming is using or threatening to use any of the waters impounded in the reservoir, or in any way to restrain the use thereof by the State of Arizona.

Only two allegations in the bill complain of the conduct of the States. First, that the representatives of these States are counselling with the Secretary of the Interior relative to the carrying out of the provisions of the Boulder Canyon Project Act. There is no allegation that said counsel is being followed or that it is resulting in any damage or injury whatsoever to the State of Arizona. The carrying out of the provisions of the Boulder Canyon Project Act is committed exclusively to the defendant Secretary of the Interior. It is true that under the provisions of said act the Secretary of the Interior may consult with representatives of the several States. He is not required so to do and his action is in no way bound by the counsel of the representatives of said States. There is no allegation that any act complained of in the bill is the result of any conference had by the Secretary of the Interior with the representatives of any of said States. Second, that the compacting

States claim some contingent remote and undefined interest in the contracts referred to in the bill of complaint for the sale of power. Arizona claims no interest whatsoever in the proceeds of such contracts. Under the terms of the bill there is no certainty that there will be any proceeds from said contract for a period of fifty years. Until there are proceeds therefrom and Arizona asserts an interest therein contrary to the alleged claims of these States, there is no controversy between these States and the State of Arizona for any court to adjudicate.

The States which are parties signatory to the Colorado River Compact have the right, with the consent and approval of the Federal government to enter into compact as to the property in which they have either a joint or several interest, and Arizona cannot lawfully complain against the exercise of such right.

Storage, Diversion, Delivery and Use of Water Controlled by the Compact.

Notwithstanding the fact that the Act in section 5 thereof, authorizes the Secretary of the Interior, under such general regulations as he may prescribe, to contract for the storage of water in said reservoir and for the delivery thereof at such points on the river and on said canal as may be agreed upon for irrigation and domestic purposes and for the generation of electrical energy, upon charges that will, in connection with other revenue, cover expenses of operation and maintenance incurred by the United States under said Act; that contracts respecting water for irrigation and domestic uses shall be for permanent service and shall conform to paragraph (a) of section 4 of the act; and no person shall have or be entitled

to have the use for any purpose of the water stored as aforesaid except by contract made as herein stated, all of the powers thus conferred are carefully restricted.

The plaintiff in its complaint alleges in paragraph XXI thereof, among other things, that the effect of said act, referring particularly to said section 5, would be to withdraw from appropriation all of the water now flowing in the Colorado River, all of which is now subject to appropriation in Arizona; to prohibit the appropriaton of said water; and to prohibit the use thereof except by contract with the Secretary of the Interior.

This fear of the complainant might be well founded were it not the fact that the terms of the Act are subordinate to the terms of the Compact and provisions of the act which leave the matters of storage, division, delivery and use of water, as provided for in the Colorado River Compact, to the jurisdiction of such compact and not to the said act, as follows:

(1) Sec. 8 (a). The United States, its permittees, licensees and contractees, and all users and appropriators of water stored, diverted, carried and/or distributed by the reservoir, canals, and other works herein authorized, shall observe and be subject to and controlled by the said Colorado River Compact in the construction, management and operation of said reservoir, canals, and other works; and the storage, diversion, delivery and use of water for the generation of power, irrigation and other purposes, anything in said Act to the contrary notwithstanding, and all permits, licenses and contracts shall so provide.

(2) Sec. 13 (b). The rights of the United States in or to waters of the Colorado River and its tributaries howsoever claimed or acquired, as well as the

rights of those claiming under the United States, shall be subject to said Colorado River Compact.

(3) Sec. 18. Nothing herein shall be construed as interfering with such rights as the States now have either to the waters within their borders or to adopt such policies and enact such laws as they may deem necessary with respect to the appropriation, control, and use of the waters within their borders, except as modified by Colorado River Compact or other interstate agreement.

While, therefore, under said section 5 there would seem to be no limitation on the right of the Secretary to sell such water, there are nevertheless the limitations in said sections above in this paragraph set forth, which bind to the Colorado River Compact the officers administering the act, the United States and permittees, appropriators and users of water, in the storage, diversion, delivery and use of waters in the River and tributaries; and which recognize the rights of those claiming under the United States as being subject to the said Colorado River Compact; and which also prevent any interference with the rights of the States to the waters within their respective borders, and to enact such policies and adopt such laws which they may deem necessary with respect to the appropriation, control and use of the waters within their borders except as modified by the said Colorado River Compact or other interstate agreement.

Argument.

The State of Arizona alleges in its bill that it has not approved the Colorado River Compact. (Complaint, par. 14, page 19.) The action of the United States and the six approving states did not and could

not affect the sovereignty of the State of Arizona (*Stearns vs. Minnesota*, 179 U. S. 223, 244 and 245) nor make that State a party to the compact, and was without prejudice to the rights of that state, so far as the compact was concerned, which it now has or hereafter could obtain to the waters of the Colorado River. Therefore, the State of Arizona is not in a position to question the validity of the compact, assert that the compact is unconstitutional or invoke the jurisdiction of this court for its construction.

The States have power to enter into compacts or agreements with other states or with the United States.

Poole vs. Fleeger, 11 Pet. 185, 209-210; Lb. (Baldwin, J.) Appendix to 11 Pet. 170a, 174-176;
Rhode Island v. Massachusetts, 12 Pet. 657, 725-731;
Stearns vs. Minnesota, 179 U. S. 223, 245;
Virginia vs. Tennessee, 148 U. S. 503;
Holmes vs. Jennisen, 14 Pet. 540, 570;
Washington vs. Oregon, 214 U. S. 205, 218;
United States vs. Texas, 143 U. S. 621, 646, 162 U. S. 1.

Art. 1, Sec. 10, par. 3 of the Federal Constitution provides:

> "No State shall without consent of Congress * * * enter into any agreement or compact with another State."

Such consent having been obtained, the States are, "in this respect restored to their original inherent sovereignty; such consent being the sole limitation imposed by the Constitution, when given, left the

States as they were before * * * whereby their compacts became of binding force * * * operating with the same effect as a treaty between sovereign powers" and "become exclusive upon all the subjects and citizens thereof, and bind their rights." *Rhode Island vs. Massachusetts*, 12 Pet. 657, 725.

Consent of Congress may be obtained either before or after conclusion of the compact and may be express or implied.

Wharton vs. Wise, 153 U. S. 155, 168, 159;
Virginia vs. Tennessee, 148 U. S. 503, 521, 525;
Virginia vs. West Virginia, 11 Wall. 39;
Penn vs. Wheeling, etc. Co., 13 How. 518;
Rhode Island vs. Massachusetts, 12 Pet. 657, 725;
Poole vs. Fleeger, 11 Pet. 185, 209-210; Lb. (Baldwin, J.) Appendix to 11 Pet. 170a, 174-176;
Green vs. Biddle, 8 Wheat. 1, 86.

The compact involves subject matter within the jurisdiction of the contracting States, and a valid and constitutional exercise of their sovereignty.

Wyoming v. Colorado, 259 U. S. 419;
Hudson Water Co. v. McCarter, 209 U. S. 349, 354-357; 70 N. J. Eq. 695, 717.
Kansas v. Colorado, 185 U. S. 125; 206 U. S. 46;
Georgia v. Tennessee Copper Co., 206 U. S. 230, 237-238;
Richey etc. Co. v. Miller & Lux, 218 U. S. 258;
Missouri v. Illinois, 180 U. S. 208; 200 U. S. 496;
Cutierres v. Albuquerque L. & L. Co., 188 U. S. 545, 552, 553;
Shively v. Bowlby, 152 U. S. 1;

The Act of Congress (42 Stat. 171) consents that the Colorado River States may "negotiate and enter into a compact or agreement * * * providing for an equitable division and apportionment among said States of the water supply of the Colorado River and of the streams tributary thereto."

The compact binds the United States, its rights "in or to the waters of the Colorado River and its tributaries", and its property within the Colorado River drainage. See Sec. 13, par. b, c, and d, Boulder Canyon Project Act (Bill 75). It binds and is conclusive upon the six approving States, their citizens and inhabitants and their rights and property within the Colorado River Basin. *Rhode Island v. Massachusetts*, 12 Pet. 657, 725; *Kansas v. Colorado*, 206 U. S. 46, 98; *Georgia v. Tennessee Copper Co.*, 206 U. S. 230, 237-238; *Richey & Co. v. Miller & Lux*, 218 U. S. 258, 281; *Virginia v. Tennessee*, 148 U. S. 503, 525.

Under the foregoing decisions of this Court, the States in question made a valid compact as to a subject matter upon which they had the right to contract. The providence or improvidence of such compact is no concern of a State not a party thereto. The complaint in this case alleges the non-navigability of the Colorado River. If such allegation is aptly made, this motion admits that fact for the purpose of the motion. If the Colorado River is a non-navigable stream, then it does not have impressed upon it the paramount power of the United States to control the waters of such river for the purpose of navigation and the States through which it runs may make such division of that water as may be consistent with their title thereto. The situation might be otherwise if the non-

navigability of the Colorado River had not been fixed by the compact. In the absence of such compact and the consent thereto of the Federal government, the States might not have been empowered to enter into a contract to divide up between themselves the waters of a navigable stream, because such waters would, if navigable, have been impressed with the power of the United States to maintain them for the purpose of commerce.

The States are not necessary parties for the determination of the question as to whether Congress has exceeded its authority in the Boulder Canyon Project Act, and they are not even proper parties in a controversy to determine that question.

Respectfully submitted,

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